Supreme Court, U.S.
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No. 96-776

In The

Supreme Court of the United States

October Term, 1996

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,

Petitioner,

-against-

COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Certiorari should not be denied based solely upon the relatively spontaneous responses of counsel at oral argument which conflict with the record and briefs submitted to the court below as well as the court's own decision.

The Petition for a Writ of Certiorari presents an issue of significant public importance, namely, whether the Individuals with Disabilities Act, hereinafter referred to as ("IDEA"). (20 U.S.C. §§1400 *et. seq.*) and its accompanying regulations, (34 C.F.R. Part 300) require public school districts to provide education and related services to students with disabilities voluntarily enrolled by their parents in non-public schools on the site of such non-public schools. Pet. p. 5. In its Petition for a Writ of Certiorari, petitioner has already set forth that there is a split among the federal circuit courts on this important issue and petitioner will not reiterate this point herein. Pet. p. 18-22. Petitioner maintains that the Writ of Certiorari should be granted.

Respondents, in their Brief in Opposition, argue that certiorari should not be granted because the petitioner's counsel "conceded in open court the only issue it seeks to review." Br. in Opp., p. 8. Specifically, respondents refer to two pages of a lengthy transcript of the oral argument before the Court below, where counsel for the petitioner, Stephen F. Bailly, answered affirmatively to a question from the Court as to whether the district would be required to provide the services at issue to children with disabilities in private schools, as long as there was no Establishment Clause prohibition. Br. in Opp., pp. 6-7.

Respondents, however, failed to include a complete transcript from the entire oral argument and thereby failed to provide this Court with the overall context of Mr. Bailly's statements.

Moreover, respondents fail to acknowledge that petitioner's statutory argument has been maintained throughout the proceedings below and, indeed, most recently, was briefed before the Second Circuit. Indeed, Point II of petitioner's brief which was submitted to the Second Circuit was aptly entitled, "The District Court Erred in Holding that the IDEA Requires the District to Implement Colleen's IEP at St. Brigid's School." Table of Contents from Petitioner's Brief submitted to the Second Circuit Court of Appeals, Petitioner's Reply Memorandum App. A. Furthermore, the Second Circuit Court of Appeals did not find that the petitioner waived its statutory defense at oral argument. In fact, in its decision, the Court explicitly recognized the petitioner's statutory argument when it stated: [t]he school district argues that although the IDEA requires it to provide Colleen with special education services, nothing in the statute or regulations requires that the school district provide the services on site at a private school" Pet. App. p. 10a.

Additionally, and contrary to the respondent's contention, the Second Circuit did not merely speak in dicta when it addressed the issue of whether the petitioner was required under IDEA to provide the contested services on the site of a private school. Br. in Opp., p. 19. Rather, it specifically ruled on this issue when it stated: "[w]e therefore hold that the IDEA requires the school district to provide Colleen with the consultant and aid at St. Brigid's." Pet. App. p. 16a. Since the Second Circuit did

not find that the petitioner had waived its statutory argument, there is no merit to respondents' contention that the issue was waived and that certiorari should be denied.

In support of their argument that a comment made by counsel at oral argument constitutes a waiver of petitioner's statutory argument, respondents cite *City of Canton v. Harris*, 489 U.S. 378, 384-385 (1989); *Moose Lodge No. 17 v. Iris*, 407 U.S. 163, 170 (1972); *Rose v. Mitchell*, 443 U.S. 545, 573-74 (1979); and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 7-8 (1993). Br. in Opp., p. 9. However, these cases do not stand for the proposition that a single "concession" made at oral argument, in and of itself, should signal a death knell to a petitioner's Writ of Certiorari, particularly when the alleged conceded argument was fully briefed before the Second Circuit Court of Appeals and counsel for the petitioner, thereafter, made a point of informing that Court of the Seventh Circuit's decision in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996), a case in which a Petition for a Writ of Certiorari has also been filed with this Court (96-323) and which presents the same statutory issues which are presented in this case. Letter forwarded by Counsel for the Petitioner to the Second Circuit Court of Appeals, Petitioner's Reply Memorandum App. B.

Respondents cite to this Court's decision in *Moose Lodge No. 17, supra,* to substantiate their assertion that an explicit renunciation of a claim justifies a conclusion that there is no longer a case or controversy. Br. in Opp., p. 9. However, in the present case, there was no explicit renunciation of the statutory defense but merely a single statement made by petitioner's counsel during oral argument

which has been taken out of context. Indeed, despite respondents' reliance on *Moose Lodge, supra,* this Court did not find, under the facts of that case, an explicit renunciation to exist and did not rule that statements made at oral argument by counsel for petitioner will bar a petitioner from being granted certiorari. In fact, this Court stated: "[w]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questions from the Court during oral argument." *Id.* at 170.

Such was the case in *Rose, supra,* another case cited by respondents in support of their position where this Court ruled that a concession made by the State of Tennessee both at oral argument and in its brief that the plaintiffs had made out a prima facie case for discrimination, was insufficient and remanded the case for further proceedings. *Id.* at 573-574.

Respondents argue that *City of Canton, supra,* supports their contention that this Court will deny certiorari where the petitioner concedes the issue in question. Br. in Opp., p. 9. The respondent acknowledges that this Court accepted review of *City of Canton, supra,* despite the fact that the petitioner in that case had made repeated concessions in their briefs to the lower court. *Id.* at 384. As set forth above, the circumstances in the present case are vastly different from those in *City of Canton supra,* in that, here, the petitioner has consistently maintained its statutory defense throughout the litigation and, at most, made an isolated human error at oral argument which was not even interpreted by that Court as a waiver of petitioner's statutory defense. Pet. App. 10a.

Finally, respondents cite this Court's decision in *Zobrest, supra,* for the proposition that petitioner has waived its statutory defenses and that certiorari should be denied. Br. in Opp., pp. 10-11. Respondents inaccurately portray the set of circumstances surrounding the present case with those presented in *Zobrest.* In *Zobrest,* this Court determined that there had been repeated concessions made by the school district that, but for Establishment Clause considerations, it would have provided a disabled student with an interpreter on the site of a parochial school. *Id.* at 7-8. In the present case, as set forth more fully above, no such repeated concessions were made regarding the district being required under IDEA to provide the contested services on the site of the private school.

Thus, the spontaneous response made by counsel for petitioner during oral argument does not demonstrate a waiver of petitioner's statutory defense, but rather, at most, a human error taken out of context. Indeed, this Court has not ruled that a single spontaneous response at oral argument, in and of itself, will preclude a petitioner from being granted certiorari. Given the nation-wide implications of the issue before this Court and the split in the federal circuit courts, petitioners respectfully urge this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: Albany, New York
December 30, 1996

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May 2, 1996

FEDERAL EXPRESS DELIVERY

United States Court of Appeals
Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

Re: Russman vs. Board of Education
Appeal # 5-7756
Argued and Submitted on February 1, 1996

Sirs:

Please be advised that we represent the Appellant, Watervliet City School District in the above referenced appeal. I am writing this letter to bring to the Court's attention the recent Decision of *K.R. vs. Anderson Community School Corporation* decided by the United States Court of Appeals for the Seventh Circuit on April 12, 1996, a copy of the Decision is enclosed. In this Decision, the Circuit Court held that a school district has discretion in providing benefits to students voluntarily attending private school. In particular, the Court held that the public school is not required to provide an instructional assistant to a disabled child in a private school where the school has given the child a genuine opportunity to participate in IDEA benefits by receiving an instructional assistant in the public school. The Court's Decision is grounded in the statutory of the IDEA and the regulations promulgated thereunder. The facts of this case are strikingly similar to our case. I respectfully request that copies of this Decision along with this letter be disseminated to the panel and its staff.

Sincerely yours,

/s/ Stephen F. Bailly
Stephen F. Bailly

SFB:jn
cc: Nancy Maurer, Esq.
Jay Worona, Esq.